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In the Supreme Court of the United States

OCTOBER TERM, 1995

JON E. EDMOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of Transportation has statutory authority to appoint judges to the Coast Guard Court of Criminal Appeals (formerly known as the Coast Guard Court of Military Review).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-10a) is reported at 41 M.J. 419. The opinion of the United States Coast Guard Court of Military Review (now called the United States Coast Guard Court of Criminal Appeals) (Pet. App. 11a-32a) is reported at 37 M.J. 787.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on February 28, 1995. The petition for a writ of certiorari was filed on May 25, 1995. The jurisdiction of this Court is

invoked under 10 U.S.C. 867a (Supp. V 1993) and 28 U.S.C. 1259(3) (Supp. V 1993).

STATEMENT

1. The United States Coast Guard is "a military service and a branch of the armed forces of the United States at all times." 14 U.S.C. 1. "Upon the declaration of war or when the President directs, the Coast Guard shall operate as a service in the Navy, and * * * shall be subject to the orders of the Secretary of the Navy." 14 U.S.C. 3. "Except when operating as a service in the Navy," however, "the Coast Guard is a part of the Department of Transportation." 49 U.S.C. 108(a); see also 14 U.S.C. 1.

The Secretary of Transportation possesses general statutory authority to "appoint and fix the pay of officers and employees of the Department of Transportation and [to] prescribe their duties and powers." 49 U.S.C. 323(a). The Secretary is also given broad authority to oversee the Coast Guard at all times when it is not operating as a service in the Navy. Thus, the Commandant of the Coast Guard is directed to "carry out duties and powers prescribed by the Secretary of Transportation" and "reports directly to the Secretary." 49 U.S.C. 108(b). The Secretary of Transportation "may promulgate such regulations and orders as he deems appropriate to carry out the provisions of [Title 14] or any other law applicable to the Coast Guard," 14 U.S.C. 633, and "[f]or the purpose of executing the duties and functions of the Coast Guard the Secretary may * * * do any and all things necessary to carry out the purposes of [Title 14]," 14 U.S.C. 92(i).

2. This case concerns the method of appointment of judges on the Coast Guard Court of Criminal Appeals

(formerly known as the Coast Guard Court of Military Review).[1] The Court of Military Review hears appeals from the decisions of courts-martial, subject to review by the United States Court of Appeals for the Armed Forces. See generally *Weiss* v. *United States*, 114 S. Ct. 752, 755-756 (1994); *Ryder* v. *United States*, 115 S. Ct. 2031, 2037-2038 (1995). The position of appellate military judge first came into existence with the Military Justice Act of 1968, Pub. L. No. 90-632, § 27, 82 Stat. 1341. Appellate judges may be commissioned officers or civilians, but each must be a member of a bar of a federal court or of a State's highest court. Art. 66(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. 866(a).[2] The

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[1] Effective October 5, 1994, Section 924(b) of the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2831, redesignated the several Courts of Military Review as Courts of Criminal Appeals. Section 924(a) redesignated the Court of Military Appeals—the highest court within the military justice system—as the Court of Appeals for the Armed Forces. 108 Stat. 2831. For the sake of clarity, this brief will refer to those courts as the Coast Guard Court of Military Review and the Court of Appeals for the Armed Forces—their names at the time they ruled on petitioner's case.

[2] Article 66(a) of the UCMJ expressly authorizes the service of civilian judges on the Courts of Military Review. See 10 U.S.C. 866(a) ("Appellate military judges who are assigned to a [Court of Military Review] may be commissioned officers or civilians."). The legislative history indicates that the use of civilian judges was authorized by Congress at the request of the Coast Guard, which desired the flexibility, due to its small number of lawyers, to appoint a civilian judge to the court. See *Uniform Code of Military Justice: Hearings on H.R. 2498 Before the Subcomm. of the House Armed Services Comm.*, 81st Cong., 1st Sess. 1189 (1949), *reprinted in Index and Legislative History, Uniform Code of Military Justice* (1950).

UCMJ provides that each service's Judge Advocate General "shall establish a Court of Military Review" and "shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him." *Ibid.* In the Coast Guard, the Judge Advocate General is the General Counsel of the Department of Transportation. Art. 1(1), UCMJ, 10 U.S.C. 801(1).

The Coast Guard Court of Military Review is composed of five appellate judges, three of whom are active-duty commissioned officers in the pay grade of O-6. *United States* v. *Carpenter*, 37 M.J. 291, 293-295 (C.M.A. 1993), vacated and remanded, No. 93-676 (June 19, 1995). The other two members of the court are "civilians," serving in the civilian pay grade of GS-15. Those two judges—Chief Judge Joseph H. Baum and Associate Judge Alfred F. Bridgman, Jr.—are retired commissioned officers who attained the military pay grade of O-6 before retirement. *Ibid.*; *United States* v. *Kovac*, 36 M.J. 521, 525 (C.G.C.M.R. 1992), aff'd mem., 39 M.J. 29 (C.M.A. 1993), vacated and remanded *sub nom. Clark* v. *United States*, No. 93-966 (June 19, 1995).

Both Chief Judge Baum and Associate Judge Bridgman received their initial appointments as civilian judges of the Coast Guard Court of Military Review from the Judge Advocate General of the Coast Guard. See *Kovac*, 36 M.J. at 525. On January 15, 1993, the Secretary of Transportation issued a memorandum stating that "[t]he assignment of appellate military judges to the Coast Guard Court of Military Review, as reflected in the General Counsel's memo of April 20, 1992, is adopted this date as judicial appointments of my own." See *Carpenter*, 37 M.J. at 294 n.1, 300. The Secretary's issuance of that memorandum

appears to have been precipitated by a communication from Chief Judge Baum to the Chief Counsel of the Coast Guard, expressing on behalf of the Coast Guard Court of Military Review the view that "the Secretary, in his capacity as a cabinet level head of department, [should] reappoint the judges so the Court would be constitutionally valid beyond any doubt." *United States* v. *Senior*, 36 M.J. 1016, 1018 (C.G.C.M.R. 1993).

In *Carpenter*, the Court of Appeals for the Armed Forces held that the method by which Chief Judge Baum had been selected before January 15, 1993, violated the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2.[3] The court noted that the General Counsel of the Department of Transportation "is not a department head, so appointment by him does not satisfy the Appointments Clause." 37 M.J. at 294.[4]

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[3] The Appointments Clause states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

[4] This Court concluded in *Weiss*, 114 S. Ct. at 757, that "those serving as military judges must be appointed pursuant to the Appointments Clause." All of the trial and appellate judges whose appointments were at issue in *Weiss* were active-duty commissioned officers—a position that requires appointment by the President with the advice and consent of the Senate. See *ibid.* This Court recognized that Congress, in Articles 26 and 66 of the UCMJ, 10 U.S.C. 826, 866, did not require a second appointment to the position of military judge before the assumption of judicial duties. 114 S. Ct. at 758, 760.

The court held, however, that Chief Judge Baum's prior judicial acts were "entitled to *de facto* validity," *id.* at 295, and affirmed Carpenter's conviction and sentence, *id.* at 299.[5]

In dictum, the court also addressed the validity of the recent secretarial appointments of the members of the Court of Military Review. The court stated that the Secretary of Transportation had "appointed all members of the Court of Military Review on January 15, 1993, fully complying with the Appoint-

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The Court also concluded that the Appointments Clause itself does not require a second appointment before military officers may discharge the duties of military judge. *Id.* at 760. The Court noted, however, that "[t]he constitutionality of the provision allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question." *Id.* at 757 n.4 (citing Art. 66(a), UCMJ, 10 U.S.C. 866(a)). The government conceded in *Ryder* that the Judge Advocate General's appointment of civilian members to the Coast Guard Court of Military Review did not comply with the Appointments Clause. See 94-431 U.S. Br. 9 n.9.

[5] In *United States* v. *Ryder*, 39 M.J. 454, 455 n.* (C.M.A. 1994), rev'd, 115 S. Ct. 2031 (1995), the court relied on *Carpenter* in affirming the defendant's conviction and sentence. (As in *Carpenter*, the decision of the Coast Guard Court of Military Review in *Ryder* was issued before January 15, 1993. See 115 S. Ct. at 2034.) This Court reversed, holding that Ryder was "entitled to a hearing before a properly appointed panel of" the Coast Guard Court of Military Review. *Id.* at 2038. The Court did not address the validity of the secretarial appointments of January 15, 1993. The judgment of the Court of Appeals for the Armed Forces in *Carpenter* was subsequently vacated and remanded for further consideration in light of this Court's decision in *Ryder*. See *Carpenter* v. *United* States, No. 93-676 (June 19, 1995).

ments Clause as of that date." 37 M.J. at 294 n.1. The court explained that

> Congress has authorized the Secretary of Transportation to "appoint . . . officers and employees of the Department of Transportation," of which the Coast Guard is a part (14 USC § 1) without Senate confirmation. 49 USC § 323. The Secretary of Transportation is the head of a "department" as that term is used in the Appointments Clause, since he is the head of one of the cabinet-level executive departments. *See* 5 USC § 101; *Freytag v. C.I.R.*, [501 U.S. 868, 886 (1991)]. Since Congress has expressly delegated the appointment of "officers" within the Department of Transportation to the Secretary of Transportation, the Appointments Clause would be satisfied if the Secretary of Transportation appointed the judges of the Coast Guard Court of Military Review.

Id. at 294.

3. Petitioner, a member of the United States Coast Guard, was convicted at a general court-martial of violating Articles 78 and 134 of the UCMJ, 10 U.S.C. 878 and 934, by (1) being an accessory after the fact to attempted sodomy; (2) committing an indecent act; and (3) dishonorably failing to maintain sufficient funds to honor three personal checks. Pet. App. 11a-12a. The convening authority approved the sentence of reduction to pay grade E-1, forfeiture of all pay and allowances, confinement for one year, and a bad conduct discharge. *Id.* at 12a.

Petitioner appealed to the Coast Guard Court of Military Review, arguing, *inter alia*, that the method by which the judges of that court were appointed violated the Appointments Clause. The Coast Guard

Court of Military Review affirmed petitioner's conviction on June 25, 1993, see Pet. App. 11a-32a—more than five months after the Secretary's January 15 memorandum adopting the Judge Advocate General's appointments as his own.[6] The court rejected petitioner's Appointments Clause challenge without discussion. See *id.* at 32a. The Court of Appeals for the Armed Forces granted review on three issues, including petitioner's contention that the manner in which the judges of the Coast Guard Court of Military Review had been designated violated the Appointments Clause. 39 M.J. 428 (C.M.A. 1984). The court ultimately affirmed petitioner's conviction and sentence, stating that petitioner's Appointments Clause challenge "ha[d] been disposed of by" *Carpenter*. Pet. App. 2a n.1.

ARGUMENT

1. The Secretary of Transportation is a "Head[] of Department[]" within the meaning of the Appointments Clause, see 5 U.S.C. 101; 49 U.S.C. 102(a) and (b); *Freytag* v. *Commissioner*, 501 U.S. 868, 886 (1991), who may be vested by Congress with the power to appoint "inferior Officers." Petitioner contends (Pet. 8-11) that, although the Secretary of Transportation appointed the judges on the Coast Guard Court of Military Review who reviewed his case, the Secretary lacked statutory authority to do so. That

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[6] Petitioner's assignment of errors was filed in the Coast Guard Court of Military Review on December 8, 1992, at a time when the members of that court were still serving pursuant to the appointments of the Judge Advocate General. The government's brief was filed, however, and the court's decision was rendered, after the Secretary's January 15, 1993, memorandum, adopting the earlier appointments as his own.

contention is incorrect and does not warrant review by this Court.[7]

a. The appointments at issue here fall within the express terms of the Secretary's statutory authority. The Secretary of Transportation is empowered to "appoint and fix the pay of officers and employees of the Department of Transportation and [to] prescribe their duties and powers." 49 U.S.C. 323(a).[8] In addition to the general grant of authority over the Department as a whole, he is charged with oversight of the Coast Guard at all times when it is not operating as a service in the Navy. The Commandant of the Coast Guard is directed to "carry out duties and powers prescribed by the Secretary of Transportation," and he "reports directly to the Secre-

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[7] Petitioner also asserts in passing that "[t]he question of whether the judges of the [Coast Guard Court of Military Review] are principal or inferior officers is not clearly settled," and that "there is a strong argument to be made that they are principal officers" who must be appointed by the President. Pet. 9 n.4. Petitioner does not expressly contend that the judges *are* principal officers, however, nor does he ask the Court to grant certiorari to resolve the issue. In the Court of Appeals for the Armed Forces as well, petitioner failed to raise the argument that members of the Coast Guard Court of Military Review are principal officers.

[8] Petitioner notes that the Secretary is given specific statutory authorization to appoint particular officers within the Department of Transportation, see Pet. 10 (citing 49 U.S.C. 102(e), 104(b)(2) and (3), and 105(b)), and contends that "[n]one of these provisions would be necessary if 49 U.S.C. § 323(a) meant precisely what it says." Pet. 10. Each of the provisions cited by petitioner, however, authorizes the Secretary of Transportation to appoint a particular officer "with the approval of the President," a qualification not included in the general grant of authority under Section 323(a).

tary." 49 U.S.C. 108(b). The Secretary "may promulgate such regulations and orders as he deems appropriate to carry out the provisions of [Title 14] or any other law applicable to the Coast Guard," 14 U.S.C. 633, and "[f]or the purpose of executing the duties and functions of the Coast Guard the Secretary may * * * do any and all things necessary to carry out the purposes of [Title 14]," 14 U.S.C. 92(i). Those provisions give the Secretary of Transportation ample statutory authority to appoint judges to the Coast Guard Court of Military Review.

b. It is true that Article 66(a) of the UCMJ, 10 U.S.C. 866(a), provides that each service's Judge Advocate General "shall establish a Court of Military Review" and "shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him."[9] That provision does not, however, withdraw statutory authority to appoint such judges from any other official who possesses it. To construe Article 66(a) as divesting the Secretary of Transportation of that power would be particularly anomalous in light of the subordinate position of the Judge Advocate General within the Department. The Judge Advocate General of the Coast Guard is

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[9] "Although Article 66 does not specifically state that the Judge Advocate General of the respective service will designate the members of the Military Courts of Review, * * * [t]hat is how the statute has been interpreted since its passage." *United States* v. *Prive*, 35 M.J. 569, 571 (C.G.C.M.R. 1992), aff'd mem., 39 M.J. 28 (C.M.A. 1993), vacated and remanded *sub nom. Clark* v. *United States*, No. 93-966 (June 19, 1995). See also *Weiss* v. *United States*, 114 S. Ct. 752, 756 (1994) (judges of the Courts of Military Review "are selected and assigned to serve by the appropriate Judge Advocate General") (citing Art. 66, UCMJ, 10 U.S.C. 866).

the General Counsel of the Department of Transportation. Art. 1(1), UCMJ, 10 U.S.C. 801(1). The General Counsel is directed by statute to "carry out duties and powers prescribed by the Secretary," 49 U.S.C. 102(e), and could presumably be directed by the Secretary to appoint a particular individual to the Coast Guard Court of Military Review. To read Article 66(a) as divesting the Secretary of his power to appoint military judges within the Department would make sense only if that power were given to an official outside the Secretary's control. The Judge Advocate General is not such a person.

c. Recognition of the Secretary's appointment power furthers the purposes of the statutory scheme as a whole. Article 66(a) expressly provides that members of the Courts of Military Review "may be commissioned officers or civilians"; Congress thus sought to preserve the services' flexibility by ensuring that a wider pool of potential judges would possess the statutory qualifications. See note 2, *supra*. The Judge Advocate General, however, is not a "Head of Department." Though he may assign to military judgeships persons already commissioned as military officers, he lacks constitutional authority to appoint civilian judges to military courts. See note 4, *supra*. If Article 66(a) were construed as divesting the Secretary of Transportation of his statutory authority to appoint departmental officers and to administer the Coast Guard, and as conferring upon the Judge Advocate General exclusive authority to select members of the Coast Guard Court of Military Review, the use of civilian judges would be effectively precluded despite Congress's express authorization of their use.

2. For the foregoing reasons, petitioner's claim that the Secretary of Transportation lacked statutory authority to appoint members of the Coast Guard Court of Military Review lacks merit and does not warrant this Court's review. We acknowledge, however, that the basis on which the Court of Appeals for the Armed Forces rejected petitioner's challenge is not clear. That court stated only that petitioner's claim "ha[d] been disposed of by" its earlier decision in *United States* v. *Carpenter*, 37 M.J. 291 (C.M.A. 1993), vacated and remanded, No. 93-676 (June 19, 1995). Pet. App. 2a n.1. The court may have been referring to dictum in *Carpenter* concluding that the Secretary's January 15, 1993, memorandum adopting the earlier appointments of the Judge Advocate General satisfied the requirements of the Appointments Clause. *Carpenter*, 37 M.J. at 294 & n.1; see pages 6-7, *supra*. Because the Coast Guard Court of Military Review decided petitioner's case on June 25, 1993, rejection of petitioner's challenge based on that aspect of *Carpenter* would have been logical and appropriate. The Court of Appeals for the Armed Forces may, however, have been relying on the *Carpenter* court's conclusion that prior judicial acts of the civilian judges were "entitled to *de facto* validity," 37 M.J. at 295, despite the constitutional infirmity of the judges' initial appointments. That holding was subsequently rejected by this Court in *Ryder* v. *United States*, 115 S. Ct. 2031 (1995). See note 5, *supra*.[10]

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[10] We note that on July 14, 1995, the Court of Appeals for the Armed Forces agreed to review another defendant's claim that "the Coast Guard Court of Criminal Appeals, which includes civilian judges, lacked jurisdiction to review

For the reasons stated above, the judgment of the Court of Appeals for the Armed Forces is correct, and the question presented by the petition does not warrant this Court's review. We believe that the petition should therefore be denied despite the uncertainty as to the ground of decision on which the Court of Appeals for the Armed Forces relied. Because of the possibility that the court below may have relied on a rationale subsequently rejected by this Court, however, the Court may wish to grant the petition, vacate the judgment below, and remand the case to the Court of Appeals for the Armed Forces for further consideration in light of *Ryder*.

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appellant's case where two of the court of criminal appeals judges were civilians who were designated in violation of the Appointments Clause of the Constitution." See *United States* v. *Leonard*, No. 95-0702/CG, Supplement to Appellant's Pet. at 5; Order Granting Review, No. 95-0702/CG (U.S.C.A.A.F. July 14, 1995). In that case, as in this one, the Coast Guard Court of Military Review issued its opinion after the Secretary of Transportation's January 15, 1993, appointment of the members of that court.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be granted, the judgment below should be vacated, and the case should be remanded to the Court of Appeals for the Armed Forces for further consideration in light of *Ryder* v. *United States*, 115 S. Ct. 2031 (1995).

Respectfully submitted.

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